TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1960

No. [redacted] 35

WATERMAN STEAMSHIP CORPORATION,
PETITIONER,

vs.

DUGAN & McNAMARA, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FILED FEBRUARY 11, 1960
CERTIORARI GRANTED MARCH 28, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

No. ~~697~~ 35

WATERMAN STEAMSHIP CORPORATION,
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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 27, 1960

[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING, Plaintiff,

v.

WATERMAN STEAMSHIP CORPORATION, Defendant and Third-Party Plaintiff, Appellant,

v.

DUGAN & MCNAMARA, INC., Third-Party Defendant.

Appeal From Final Judgment of the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 17035.

APPELLANT'S APPENDIX

[fol. 1]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RELEVANT DOCKET ENTRIES

June 11, 1954.	Complaint filed.
June 11, 1954.	Summons exit.
June 11, 1954.	Plaintiff's demand for jury trial filed.
June 25, 1954.	Appearance of Rawle & Henderson, Esqs. for defendant filed.
June 28, 1954.	Answer filed.
June 30, 1954.	Order to place case on trial list.
July 6, 1954.	Plaintiff's Interrogations filed.
July 21, 1954.	Summons returned "On 6/22/54 served and filed."
July 27, 1954.	Answers to plaintiff's interrogatories filed.
July 27, 1954.	Defendant's notice of taking oral deposition of plaintiff filed.
Feb. 29, 1956.	Motion and Order joining Dugan & McNamara, Inc. as a Third-party defendant filed. 3/1/56 noted and notice mailed.
Feb. 29, 1956.	Third-party Complaint filed.
Feb. 29, 1956.	Third-party summons exit.
Mar. 29, 1956.	Third-party Summons returned: "On 3-20-56 served" and filed.
May 31, 1956.	Defendant's notice of taking deposition of Matthew A. McGuire, filed.
June 7, 1956.	Defendant's notice of taking deposition of Matthew A. McGuire, filed.

[fol. 2]

Oct. 1, 1956.	Stipulation and Order that third party defendant be permitted to file an answer to third party Complaint filed. 10/2/56 noted.

Oct. 1, 1956. Third Party Defendant's Answer to Third Party Complaint filed.

Oct. 18, 1956. Order granting third party plaintiff leave to file Amended Third Party Complaint filed. 10/19/56 noted.

Oct. 18, 1956. Amended Third Party Complaint filed.

Dec. 1, 1956. Third party defendant's notice of taking deposition of plaintiff filed.

Dec. 4, 1956. Stipulation and Order of Court that answer to amended third party complaint may be filed, filed. Noted 12/5/56.

Dec. 4, 1956. Answer to amended third party complaint filed.

Dec. 5, 1957. Deposition of M. C. Bjorklund, filed.

Dec. 5, 1957. Deposition of Marlowe Bjorklund, filed.

Dec. 5, 1957. Jury called and sworn (as to Third-Party Action only). Clary.

Dec. 5, 1957. Trial—witnesses sworn.

Dec. 6, 1957. Trial resumed.

Dec. 6, 1957. Deposition of Captain Matthew A. McGuire, filed.

Dec. 9, 1957. Withdrawal of appearance of Beechwood & Lovitt, Esqs. and appearance of Beechwood, Lovitt & Murphy for third party defendant, filed.

Dec. 10, 1957. Trial resumed.

Dec. 11, 1957. Points for charge on behalf of Waterman Steamship Corporation filed.

[fol. 3]

Dec. 11, 1957. Points for charge on behalf of Dugan & McNamara, Inc. filed.

Dec. 11, 1957. Motion of Dugan & McNamara, Inc. for judgment on the whole record filed.

Dec. 11, 1957. Special interrogatories filed.

Dec. 11, 1957. Trial concluded.

Dec. 11, 1957. The Court directs a verdict in favor of Third-Party Defendant against Third-Party Plaintiff. Judgment accordingly. Clary.

Dec. 11, 1957. Judgment in favor of Third-Party Defendant against Third-Party Plaintiff, with costs, filed. 12-12-57 noted and notice mailed. Clary.

Jan. 7, 1958. Notice of Appeal by Waterman Steamship Corporation, filed. Copies to Freedman, Landy & Lorry, Esqs. and Beechwood, Lovitt & Murphy, Esqs.

Jan. 7, 1958. Copy of Clerk's Notice to U. S. Court of Appeals, filed.

Third party plaintiff's exhibits 1, 2 and 3. Jan. 27, 1958.

[fol. 4]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed June 11, 1954

Jury Trial Demanded

Plaintiff, Jasper King, claims of the defendant, Waterman Steamship Corporation, the sum of Fifty Thousand Dollars ($50,000.00), upon a cause of action whereof the following is a true statement:

1. Plaintiff is a citizen and resident of the Commonwealth of Pennsylvania.

2. Defendant is a corporation organized and existing under and by virtue of the laws of the State of Alabama.

3. Plaintiff avers, upon information and belief, that at all times mentioned herein defendant owned, operated, managed, possessed and controlled the S. S. "Afoundria" in foreign, coastwise and intercoastal commerce

4. Plaintiff, on or about the 9th day of August, 1952, and at all times mentioned herein, was an employee of Dugan and McNamara, Inc., of Philadelphia, Pennsylvania, in the capacity of longshoreman.

5. On or about the 9th day of August, 1952, and at all times mentioned herein, Dugan and McNamara, Inc., of Philadelphia, was employed in discharging a cargo of sugar from the S. S. "Afoundria" by virtue of authority from and an understanding entered into with the said vessel's owners, charterers, operators and duly organized representatives, including the defendant herein.

6. On or about the 9th day of August, 1952, at or about 2:00 P. M., plaintiff, in the course of his employment, engaged in the performance of his duties in connection with the discharge of cargo from the S. S. "Afoundria" while the said S. S. "Afoundria" was in navigable waters of the United States and moored at Pier 46 North, was working aboard the S. S. "Afoundria" discharging one hundred [fol. 5] pound bags of raw sugar, when, because of the defective, unsafe and unseaworthy condition of the ship and the negligence of the defendant, a great number of bags of sugar became dislodged and crashed down upon the plaintiff with great force and effect, as the result of which he sustained the injuries which are more specifically set forth hereinafter.

7. Disregarding its duties in the premises, defendant, by its agents, servants, workmen and employees, was careless and negligent and the vessel was unseaworthy in:

(a) Failing to provide a safe place for plaintiff to perform his duties;

(b) Failing to properly supervise and inspect the stowage of the aforesaid cargo of sugar;

(c) Allowing and permitting said cargo of sugar to be stowed in such a negligent and careless manner as to constitute a danger to plaintiff and other workmen unloading said cargo;

(d) Failing to warn the plaintiff and other workmen of the dangerous and defective stowage of the cargo of sugar;

(e) Permitting plaintiff and other workmen to commence unloading operations in a dangerous place of employment;

(f) Failing to provide plaintiff with a safe and seaworthy vessel, appliances and appurtenances;

(g) Failing to use due care under the circumstances.

8. By reason of the negligence of the defendant and the unseaworthiness of the vessel as set forth above, plaintiff sustained severe injuries to his back, chest, shoulders, arms, legs, hands and feet; his back, chest, shoulders, arms, legs, [fol. 6] hands and feet and the muscles, nerves, tendons, blood vessels and ligaments attached thereto were severely wrenched, sprained, bruised, fractured and otherwise injured; he sustained a spiral fracture of the lower shaft of the fibula of the left leg; he sustained contusions and abrasions of the left shoulder; he sustained internal injuries, the full extent of which are not yet known; he was required to undergo long periods of hospitalization in the past, and upon information and belief avers that he will be required to undergo long periods of hospitalization in the future; he sustained a severe shock to his nervous system with injuries to his nerves and nervous system; he has suffered agonizing aches, pains, mental anguish and disability, and upon information and belief avers that he will suffer agonizing aches, pains, mental anguish and disability in the future; he has been unable to assume his usual duties and occupation for a long period of time in the past, and upon information avers that his injuries have become aggravated and permanent, and that he will be permanently and totally disabled from performing his usual duties and occupation in the future; he has been compelled to expend and incur obligations for medical attention in the past and will be required to do so in the future.

Wherefore, plaintiff, Jasper King, claims of the defendant the sum of Fifty Thousand Dollars ($50,000.00) with lawful interest thereon, and brings this action to recover same.

Freedman, Landy and Lorry, By Benjamin Kuby,
Attorneys for Plaintiff.

[fol. 7]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed June 28, 1954

1. The allegations in paragraphs 1, 2 and 4 of the complaint are admitted.

2. It is admitted that the defendant owned and operated the Steamship Afoundria in the foreign, coastwise and intercoastal commerce, but it is denied that at the time of the occurrences alleged in the complaint that the defendant fully managed, possessed and controlled the said vessel, but on the contrary avers that her holds, decks, equipment and appurtenances were in the sole and exclusive possession and control of Dugan and McNamara, Inc., which was an independent stevedoring company to the extent necessary in the performance of said stevedoring. It is further averred that the plaintiff and his fellow-employees, who were employees of said Dugan and McNamara, Inc., and the manner of performing said work, were under the exclusive direction and control of said Dugan and McNamara, Inc.

3. The allegations in paragraph 5 of the complaint, as qualified by the averments in paragraph 2 hereof, are admitted.

4. It is admitted, as alleged in paragraph 6 of the complaint, that on August 9, 1952, about 2:00 o'clock P. M. the said steamship Afoundria was in navigable waters, moored at Pier 46 North, and that the plaintiff at or about said time was working aboard the vessel and sustained certain injuries as the result of being struck by some bags of sugar. All of the other allegations in said paragraph are denied.

5. The allegations in paragraph 7 of the complaint are denied.

[fol. 8] 6. It is admitted, as alleged in paragraph 8, that the plaintiff sustained certain injuries, but the defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations pertaining to the

nature and extent of the plaintiff's injuries, his disability, and the consequences of said injuries, and therefore demands proof thereof. It is denied that any injuries sustained by the plaintiff were the result of any negligence on the part of the defendant, or unseaworthiness of the vessel.

7. As a further and separate defense the defendant avers, on information and belief, that the claimant's injuries were caused in whole or in part by his own negligence.

8. As a further and separate defense it is averred that the plaintiff assumes the risk of his employment.

Rawle & Henderson, By ....., 1910
Packard Building, Philadelphia 2, Pa., Attorneys for Defendant.

[fol. 9]

IN UNITED STATES DISTRICT COURT

AMENDED THIRD-PARTY COMPLAINT—Filed October 18, 1956

The amended third-party complaint of Waterman Steamship Corporation, third-party plaintiff, by its attorneys, against Dugan & McNamara, Inc., third-party defendant, respectfully shows to this Honorable Court upon information and belief as follows:

1. Plaintiff Jasper King instituted the above-captioned proceeding against Waterman Steamship Corporation alleging personal injuries resulting from the falling of one or more bags of raw sugar while discharging cargo in the hold of Steamship Afoundria at Pier 46, North Wharves, Philadelphia, on or about August 9, 1952. A true and correct copy of the complaint was annexed to the original third-party complaint as Exhibit "A."

2. The answer to the complaint averred upon information and belief that the accident was not caused by any unseaworthiness of the vessel or the negligence of those in charge of her, and that the holds, cargo spaces, equipment and gear involved in the discharging operation was under the exclusive management and control of Dugan &

McNamara, Inc. and their employees, as independent contractors. A true and correct copy of the answer was annexed to the original third-party complaint as Exhibit "B."

3. Third-party plaintiff is informed and believes on the basis of subsequent investigation that the accident occurred under the following circumstances:

The No. 4 lower hold of the vessel was loaded with bags of raw sugar at San Carlos, Negros Islands, P. I., completely across the hold from the forward bulkhead aft to [fol. 10] a point approximately midway of the tween deck hatch, where the bags were bulkheaded into a flat vertical wall approximately 20 feet high from the floor of the hold. The bulkheading, or cross-ties, extended inward for a depth of about six bags from the outer surface of the vertical wall, and beyond this depth the bags were laid directly in line and one above the other in accordance with proper stowage custom and practice, and with due and proper care to stow the bags in a safe and seaworthy manner. The exposed wall of bags did not move, shift, or become dislodged at any time material to this action. When the longshoremen, under the supervision and control of third-party defendant, proceeded to remove the bags at Philadelphia, they first broke down the bags in the square of the hatch to a distance of approximately six (6) feet or more, and removed the bags at this level, starting with the square of the hatch and working toward the forward bulkhead, thereby exposing the portions of the stow where the bags were placed directly one above the other, but without taking proper, safe and adequate precautions to prevent any vertical tiers, left unsupported by removal of adjacent bags, from falling from a height of six (6) feet or more.

While Jasper King and others were removing bags from a location about six feet aft of the forward bulkhead, one or more bags fell from the top of one tier and struck Jasper King, causing the various severe personal injuries mentioned in the complaint. The only condition attributable to the vessel which could have been material in connection with this accident was the placing or shifting of a bag at or near the bottom of the exposed tier in such a position that the bags above it would not be firmly supported when reached by the longshoremen, which condition must have

existed in order to produce the aforesaid accident under the circumstances disclosed by investigation. The said unstable, unsafe, and to that extent unseaworthy, condition of the stowed bags would not have resulted in the aforesaid acci-
[fol. 11] dent except for the direct, primary and substantial negligence of the third-party defendant's employees in breaking down the stowed bags to an unsafe depth and thereby causing the tier to become exposed without safe, reasonable and adequate lateral support, which condition was or should have been known to third-party defendant, its representatives, supervisors, foremen, and longshoremen.

4. The unseaworthy condition of the stow which was created by the shifting or the improper placing of a bag at or near the bottom of the exposed portion of the vertical tier from which the bag or bags fell, involved absolute liability on the part of Waterman Steamship Corporation as defendant in the original action brought against it by Jasper King, as plaintiff; but the direct, proximate, active and substantial cause of the accident upon which the absolute liability of the third-party plaintiff was predicated as a matter of law, was the negligence of third-party defendant, its agents, representatives and employees, in failing to perform the contracted stevedoring services in a safe, proper, customary, careful and workmanlike manner under the circumstances.

5. By reason of the absolute liability of third-party plaintiff caused by the primary and substantial negligence of third-party defendant, third-party plaintiff has entered into a fair, just and reasonable compromise settlement with plaintiff Jasper King in the net sum of $6,867.55, including loss of wages, impairment of earning capacity, limitation of activities, possible future medical care, and substantial pain and suffering.

6. Third-party plaintiff is entitled to full indemnity from third-party defendant for all sums paid over to Jasper King, plaintiff, in just and reasonable settlement of his claims against third-party plaintiff as aforesaid in
[fol. 12] the amount of $6,867.55 with interest thereon from

date of payment, and taxable costs in the present proceeding.

Wherefore, the third-party plaintiff demands judgment against third-party defendant as indemnity in the sum of $6,867.55, with interest and costs.

Rawle & Henderson, By ....., 1910
Packard Building, Philadelphia 2, Pa., Attorneys for Third-Party Plaintiff.

[fol. 13]

IN UNITED STATES DISTRICT COURT

ANSWER TO AMENDED THIRD-PARTY COMPLAINT—Filed December 4, 1956

The Answer of the third-party defendant, Dugan & McNamara, Inc., by its attorneys, to the Amended Third-Party Complaint of the third-party plaintiff, Waterman Steamship Corporation, respectfully alleges, upon information and belief, as follows:

1. It is admitted that Jasper King instituted the above captioned proceedings. It is admitted that he alleged injuries. It is denied, however, that he suffered the injuries alleged. The third-party plaintiff, in paragraph 6 of its Complaint, alleged, among other things, "the defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations pertaining to the nature and extent of the plaintiff's injuries, his disability, and the consequence of said injuries, and therefore demands proof thereof."

2. It is admitted that the Answer to the Complaint avers that the Waterman Steamship Corporation averred that the vessel was not unseaworthy or that there was any negligence of those in charge of her. Third-party defendant avers that if the vessel was seaworthy and there was no negligence of the Waterman Steamship Corporation, the said Waterman Steamship Corporation was not liable in any respect to the plaintiff, Jasper King.

3. Denied. The third-party plaintiff admits in paragraph 3 of its Complaint that the manner and method

in which the bags were stowed caused the vessel to be unseaworthy and was the underlying cause of the accident.

4. Denied. The third-party defendant demands strict proof of the absolute liability on the part of the Waterman Steamship Corporation as defendant. It is denied that the [fol. 14] liability of the Waterman Steamship Corporation was predicated upon negligence of the third-party defendant.

5. Denied. Third-party plaintiff entered into indemnity agreements with the plaintiff, Jasper King.

6. It is denied that the settlement was reasonable or just. It is further denied that the third-party defendant is in any way bound by the action of the third-party plaintiff.

First Defense

Third-party defendant is the employer of Jasper King, the plaintiff in this case, and the accident which is the subject of the litigation occurred under circumstances making the third-party defendant responsible to the said plaintiff for benefits under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. A. Sec. 901 et seq. Sec. 5 of said Statute, 33 U. S. C. A. Sec. 905, provides that upon payment of compensation under the provisions of the said statute, third-party defendant is discharged of all liabilities to the plaintiff or any other person otherwise entitled to bring suit against the third-party defendant. Third-party defendant asserts that benefits under the said Longshoremen's and Harbor Workers' Act have been tendered and accepted by the plaintiff. Third-party defendant therefore alleges that the said statute is the complete defense to the Amended Third-Party Complaint and therefore prays that the action be dismissed as to the Third-party defendant.

Second Defense

To the extent that the amended Third-Party Complaint purports to set forth a cause of action against third-party defendant by way of indemnity the third-party defendant

denies that there is any contract upon which indemnity may be founded.

[fol. 15] *Third Defense*

The Amended Third-Party Complaint fails to state any ground for relief and fails to set forth any cause of action against the third-party defendant upon which relief can be granted, and therefore the Amended Third-Party Complaint must be dismissed.

Wherefore, Dugan & McNamara, Inc., denies that the third-party plaintiff is entitled to any judgment against it by way of indemnity or otherwise, and prays that the Amended Third-Party Complaint be dismissed with costs assessed against the third-party plaintiff.

Beechwood and Lovitt, By George E. Beechwood, Beechwood Building, 2009 Walnut Street, Philadelphia 3, Pa., Attorneys for Third-Party Defendant.

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* * * * * * *

[fol. 214]

SIDEBAR COLLOQUY RE STIPULATION

Mr. Beechwood: May we see Your Honor at side bar?
The Court: Surely. Come up.

(The following took place at side bar:)

Mr. Beechwood: Mr. Kildare, I think you will concede that there was no agreement, written or oral, between the ship and Dugan & McNamara.

Mr. Kildare: There was no contract between Dugan & McNamara and the Waterman Steamship Corporation, that is correct.

Mr. Beechwood: Oral or written.

Mr. Kildare: I agree to that. That is right. We concede that, though we of course deny its materiality under the cases.

[fol. 215] Mr. Beechwood: We understand that. If you didn't, I would have to bring in somebody from Dugan & McNamara to prove it, that is all.

Mr. Kildare: There is no problem there. We concede that, certainly.

(End of proceedings at side bar.)

The Court: All right, gentlemen, we can proceed now.

* * * * * * * * *

[fol. 263]

STATEMENTS OF THE COURT TO THE JURY AND TO COUNSEL AT THE CLOSE OF THE TRIAL RELATING TO REASONS FOR GRANTING DEFENDANT'S MOTION FOR JUDGMENT

(The jury returned into court at 11:15 A.M., at which time the following took place:)

The Court: Members of the jury, I asked you to stay out this morning because I wanted the law of this case argued rather fully, and as far as your concern with the case goes, that will be at an end when I finish the few words that I have to say to you.

Under our rules a party may move for judgment at the conclusion of a case, and it is then the duty of the Court to determine whether, under the facts as established from the witness stand, depositions, and whatever other evidence in the nature of documents or otherwise introduced, there is some question for you to pass on. I have determined that, under the law, the case should not be passed on by you.

Ordinarily, when a ship comes into port, that ship must be discharged; the cargo must be taken off and put on the dock. Historically that was the ship's duty, and the members of the crew were charged with the obligation of transferring that cargo from the ship to the dock. With the improvement in all lines of industry, shipowners found it to their advantage to transfer that obligation to an independent contractor known as a stevedoring company, who employ longshoremen of the type that you have seen here in the last week. It is the stevedore's duty to remove that cargo from the ship to the dock. The ship, however, cannot avoid its liability to its own seamen nor to the stevedores, who are entitled to the protection afforded sailors from time immemorial. The Supreme Court of the United States has held in several cases that that is a non-delegable duty [fol. 264] on the part of the ship and that the ship's re-

sponsibility must go to the stevedores or longshoremen. So if a ship is in any way unseaworthy and as the result of that unseaworthiness one of the stevedores is injured, that stevedore has a right of recovery against the ship itself. That was the situation in this case at the outset when Jasper King filed his complaint.

Now, you heard read into the record yesterday the basis of the shipowner's complaint against the stevedore. That was read in here yesterday, in which, as a result of investigation, they said that the ship became unseaworthy because of a shifting or a misplacing of a bag at the time of the loading of this particular vessel at Port Negros in the Philippine Islands:

If the ship was unseaworthy, it owed an obligation to that longshoreman if he was injured as a result of that unseaworthiness. There is no doubt about the injury. There is no doubt that the money that was paid to that man, something in the neighborhood of $6800, was reasonable, fair compensation for the injuries that Jasper King sustained up there that day. However, if the ship was not unseaworthy and the ship was not negligent in affording the man a safe place to work, then the payment was made as a volunteer and there is no right of recovery against the stevedore.

You have heard the testimony here as I have heard it. I don't recall that there is one iota of testimony that there was any misplaced or shifted bags on that ship. I don't remember one iota of testimony to substantiate that. The expert Keeler, who appeared to be a gentleman who knew his business, testified without reserve that it was the manner of unloading, that the bags were brought down in too high a pile, that caused it to buckle, and he stated unequivocally also that it was the sole negligence of Dugan & McNamara, the stevedore, acting through its employees, that created the condition that caused the injury. In other words, he attributed the sole fault of this accident, not to the ship, [fol. 265] not to unseaworthiness, not to any negligence on the part of the vessel, but solely negligence on the part of the stevedore. Under those circumstances I would not be permitted to let the case go to you for indemnity on the part of the stevedore to the shipowner.

We have through the Congress of the United States a Longshoremen's and Harbor Workers' Workmen's Compensation Act. When they are injured in the course of their duties, it is the duty of the stevedoring company to pay them certain benefits which the law requires and which ordinarily are paid by an insurance company, but that is his sole remedy against his employer. He may not sue his employer for injuries, and the law, while providing benefits, also takes in rights he may have had against his employers or fellow employees in connection with any recovery for those injuries. There have been many cases where indemnity has been allowed. For instance, one case I can illustrate came up in the argument this morning. The stevedore himself brought aboard an instrument of unloading which was defective, and it was used, and the employee was injured. He sued the ship, and the court allowed a recovery against the ship, but they also said that under the theory of warranty to do the work in a proper and safe fashion on the part of the stevedore, he owed indemnity back to the shipowner, and they allowed a recovery in that case, but that isn't this case.

This is an unusual case. It may seem hard to understand how Dugan & McNamara got aboard that ship when there was no contract, oral or written, with the Waterman Steamship Company. That has been stipulated of record and it is a fact in this case on which, in part, I am basing my decision. It hasn't appeared of record how they got aboard the ship, and it is not of record, I happen to know, because I have been informed, that the owner of the cargo did their own stevedoring, which meant that the National Sugar Refining Company were responsible for taking it off, and that they engaged Dugan & McNamara, but there is a [fol. 266] difference of opinion, members of the jury, among the several courts of this country, the courts of appeals, as to whether or not, in a circumstance similar to this one, a shipowner is entitled to indemnity for payments made to an injured seaman stevedore. It seems clear to me from a reading of the cases in our circuit that in order to have indemnity, it must stem from a contract, that there must be contractual obligations stemming from the stevedore to the shipowner, and that can be either a written contract

or an oral contract, and the contract does not even have to provide for indemnity. In a proper case the court says that the contract to take the cargo off has implicit in it the obligation to do it in a workmanlike, safe manner, but here there is absolutely no contract running between Dugan & McNamara and the ship.

As I said, it does not appear of record just exactly what the contract is or its terms that they may have had with someone else, but I have come to the conclusion that under all the established facts in this case—and it is a real technical question of law—that there can be no right of indemnity under the cases of our circuit as I read them, and therefore am going to grant the motion of the third-party defendant, Dugan & McNamara, for judgment in its favor and against the third-party plaintiff, the Waterman Steamship Company.

You can rest assured, ladies and gentlemen, that this is not the end of the case. This happens to be a type of case that the Supreme Court had before it and refused to answer. I think it will be sent back there very shortly, unless I am reversed on my thinking by this circuit, which always can happen.

Ladies and gentlemen, that will conclude your service on this case. I will ask you to return to your jury room, and perhaps I will see some more of you on the next case.

Thank you very much.

Mr. Kildare: If the Court please, there is just one point we would like to suggest, that Your Honor may have erred [fol. 267] in quoting the record. That is your reference to the admissions or the pleadings that were made here. You indicated that Waterman had said that the bag shifted, and so on, at the time of loading. Of course, that is not quite correct—

The Court: Had been improperly placed at the time of loading or had shifted on the journey.

Mr. Kildare: The placing or shifting of a bag. It did not, sir, exclude the possibility that that shifting had occurred during the ocean voyage.

The Court: No, I didn't mean to exclude that either. I thought that was part of what I said. At least I was thinking of it at the time I said it.

Mr. Kildare: In case it was material to Your Honor's thinking, I wanted to call that to your attention.

The Court: No, I haven't made any difference on that.

Mr. Kildare: May we have an exception to Your Honor's ruling?

The Court: Oh, yes, certainly you may.

Mr. Beechwood: May I thank Your Honor and the members of the jury for the very kind attention.

Mr. Kildare: I am sure we will agree with that.

The Court: You may retire, members of the jury.

I would like to have docketed all points for charge, suggested interrogatories, and motions for judgment on the record. I would like to have all of them immediately docketed so that the case may proceed, and so that we can save time for appeal and otherwise, Mr. Kildare, I will instruct the Clerk to enter judgment on the verdict for the defendant.

Mr. Kildare: You are, I think, entering judgment on the motion to dismiss, are you not?

[fol. 268] The Court: I am entering judgment. I have considered this a motion for judgment under Rule 50.

Mr. Kildare: Very good.

The Court: Therefore the Court will enter judgment in favor of the defendant.

Mr. Beechwood: Thank you, Your Honor.

Mr. Kildare: We respectfully except to the entry of that judgment.

(Adjourned at 11:35 A.M.)

[fol. 268a] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JASPER KING, Plaintiff,

v.

WATERMAN STEAMSHIP CORPORATION, Defendant & Third-Party Plaintiff,

v.

DUGAN & MCNAMARA, INC., Third-Party Plaintiff.

JUDGMENT—December 11, 1957

Before Clary, J.

And Now, to wit: December 11th, 1957, in accordance with the Verdict as Directed by the Court, it is Ordered that Judgment be and is hereby entered in favor of Third-Party Defendant, Dugan & McNamara, Inc., and against Third-Party Plaintiff, Waterman Steamship Corporation, with costs.

By the Court:

[fol. 268b] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 269] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING,

v.

WATERMAN STEAMSHIP CORPORATION (deft. and 3d-party pltf.), Appellant,

v.

DUGAN & McNAMARA, INC. (3d-party deft.).

Present: Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

ORDER SETTING CASE DOWN FOR REHEARING EN BANC—August 5, 1958

It is Ordered that the above-entitled case be set down for rehearing before the Court en Banc.

By the Court, Kalodner, Circuit Judge.

Dated: August 5, 1958

[fol. 270]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING,

v.

WATERMAN STEAMSHIP CORPORATION, Defendant and Third-Party Plaintiff, Appellant,

v.

DUGAN & McNAMARA, INC., Third-Party Defendant, Appellee.

Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued June 10, 1958

Reargued December 1, 1958

Before: Biggs, Chief Judge; Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed January 16, 1959

Per Curiam:

This is an appeal by a third-party plaintiff, defendant to the original negligence claim, from a decision that as a matter of law it is not entitled to be indemnified by the appellee, against which it has made the present third-party claim.

It is admitted that appellant, a shipowner, has paid damages to the original plaintiff, a stevedore, for shipboard injuries caused in part by the improper stowage of cargo. [fol. 271] Appellant concedes its absolute liability to the injured stevedore for the hurtful consequences of this un-

seaworthy condition. However, appellant claims indemnity from the appellee, the stevedoring company which employed the injured man, on the theory that primary responsibility for the accident and an obligation to indemnify the shipowner should be imposed on the appellee because the immediate cause of the accident was appellee's negligence in unloading the cargo, improper though the stowage admittedly was.

How this case might have stood had the shipowner employed the stevedoring company to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation between shipowner and stevedoring company. Rather, as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctness of this allegation was stipulated at trial. Thus, whatever arrangement was made for unloading the cargo,[1] the shipowner was not party to it and claims no benefit under it.

The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim. Any obligation of a stevedoring company to indemnify a ship for shipboard injury of its employees in the course of their employment must be bottomed on agreement between the parties, express or implied in fact. We have so stated in *Brown* v. *American-Hawaiian S. S. Co.*, 3d Cir. 1954, 211 F.2d 16, 18 and *Crawford* v. *Pope & Talbot, Inc.*, 3d Cir. 1953, 206 F.2d 784, 793. We adhere to that view of the matter.

The judgment will be affirmed.

[fol. 272] BIGGS, *Chief Judge*, dissenting.

Deeming the evidence to be insufficient to support a finding that the ship's cargo-loading gear which broke in-

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[1] It was stated to us in argument and mentioned by the court below in directing a verdict against the third-party claim that the stevedoring company had been employed by the owner of the cargo to unload it. But no evidence was introduced concerning this matter and counsel for the appellant stated to the court below that the particular contractual arrangement under which the unloading was performed was not material to the third-party claim.

juring the longshoreman was unseaworthy, this court in Crumady v. The Joachim Hendrik Fisser, 249 F.2d 818, 821 (1957), cert. granted 357 U.S. 903 (1958), stated that for that reason, "[W]e do not reach the substantial question raised by the impleaded respondent [the stevedoring company] whether there would have been legal basis for making it an indemnitor, had the ship's liability been sustained." In Crumady there was no express contract, written or oral, between the shipowner and the stevedoring company for the unloading of the vessel. 142 F.Supp. 389 (D.N.J. 1956), at p. 401. In the instant case there was no express contract, written or oral, for the unloading of the ship between the shipowner, Waterman, and the stevedoring company, Dugan and McNamara, Inc., the latter company having unloaded the vessel perhaps because of an "understanding" with the shipowner, Waterman.[1] "The

[1]Apparently there was no express contract, oral or written, for the unloading of the vessel. It should be noted, however, that paragraph 5 of the injured longshoreman's complaint alleges that Dugan and McNamara, Inc. was employed to discharge the cargo "by virtue of authority from and an understanding entered into" by Dugan and McNamara, Inc. with the vessel's "owner", alleged to be Waterman. Waterman's answer to the longshoreman's complaint, paragraphs 2 and 3, admitted the allegations of paragraph 5 of the complaint with an immaterial qualification. The amended third-party complaint is silent as to any contract or "understanding" for the unloading of the vessel. The second defense of the amended answer to the third-party complaint denies that "there is any contract upon which indemnity may be founded".

A stipulation entered into by counsel for Dugan and McNamara, Inc. and counsel for Waterman, transcript p. 296, in the form of question and answer given at sidebar during the trial was as follows: Counsel for Dugan and McNamara, Inc. stated to counsel for Waterman, "I think you will concede there was no agreement, written or oral, between the ship and Dugan and McNamara." Counsel for Waterman replied, "There was no contract between Dugan and McNamara and the Waterman Steamship Corporation, that is correct." Counsel for Dugan and McNamara, Inc. then said, "Oral or written." Counsel for Waterman replied, "I agree to that. That is right. We concede that, though we of course deny its materiality under the cases."

The nature of the arrangement for the unloading of the vessel is far from plain on this record but the pleading and the statements of counsel may express the view that even though there was no contract, oral or written, there was nonetheless an "understanding"

[fol. 273] substantial question" referred to by this court in Crumady is before us in the instant case. It is whether the shipowner may recoup its loss against the stevedoring company if that company's negligence caused the injury to the longshoreman, there being no express contract for the unloading of the ship entered into by the shipowner and the stevedoring company.

In so stating I am not unmindful of the ruling of this court in Hagans v. Farrell Lines, 237 F.2d 477 (1956), that neither indemnity nor contribution can be recovered by the shipowner from the stevedoring company where the shipowner's negligence has concurred with that of the stevedoring company in causing the accident. As was stated in the dissenting opinion in Hagans, 237 F.2d at p. 483, the decision of this court in that case unduly limited the scope of Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956), and was in apparent conflict with American President Lines v. Marine Terminal Corp., 234 F.2d 753 (9 Cir. 1956), cert. den. 352 U.S. 926 (1956).[2]

I think, however, that the Hagans doctrine, even assuming its soundness, is inapplicable under the pleadings and the evidence in the case at bar for the jury would have been entitled to find, as contended by Waterman, that the "direct, proximate, active and substantial cause of the accident" was the negligence of the stevedoring company. I cannot conclude that the decision of the Supreme Court in Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282 (1952),

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between Waterman and Dugan and McNamara, Inc. that Dugan and McNamara, Inc. would unload the vessel but that such an understanding could not support indemnity. For the reasons set out at a later point in this opinion I think it is immaterial that there was no express contract, written or oral.

[2] It should be noted that the case at bar was heard before the court en banc as was the Hagans case and for this reason the present writer believes that a dissent should be recorded not only in the instant case but also to the fundamental principle involved in the majority opinion in Hagans and open for reconsideration here since a court en banc sat to adjudicate the instant case. As to possible rejection of this court's view in Hagans by the Supreme Court, see the illuminating opinion of Judge Hoffman in Ravel v. American Export Lines, 162 F. Supp. 279, 288 (E.D. Va. 1958).

would prevent recovery by the shipowner if the stevedor- [fol. 274] ing company's negligence was the direct, active, proximate and substantial cause of the longshoreman's injury. If the jury should so find, no principle of contribution necessarily would be involved for the law would then require no division of damages between the shipowner and the stevedoring company. Indemnity arises from a contract, express or implied, and enforces a duty on the wrongdoer to respond for damages. Thomas v. Malco Refineries, Inc., 214 F.2d 884, 885 (10 Cir. 1954). See Brown v. American-Hawaiian S.S. Co., 211 F.2d 16, 18 (3 Cir. 1954). Cf. the circumstances and the decision in Crawford v. Pope & Talbot, Inc., 206 F.2d 784, 793 (3 Cir. 1953). I had thought that the independent right to indemnity was established in this circuit by the decision in the case last cited. We point out also that in Weyerhaeuser S.S. Co. v. Nacirema Co., 355 U.S. 563, 569 (1958), the Supreme Court stated: "[W]e believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate.", citing Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., *supra.*

Last, indemnity for the shipowner need not necessarily be based on an express contract between the shipowner and the stevedoring company. When a stevedoring company goes on a ship to unload it the stevedoring company represents in substance to the shipowner that the unloading will be done with reasonable care and in a reasonably safe manner under the circumstances. The stevedoring company may be deemed to offer a unilateral contract to the shipowner saying in substance: "If you will permit me to come upon your ship and unload it I will use reasonable care in the unloading." The shipowner accepts the offer by making its ship available. Such an arrangement or contract was in effect between the shipowner and the stevedoring company in Hagans, creating what was described there as a "relational duty", 237 F.2d at p. 481. As was [fol. 275] stated in the majority opinion in Brown v. American-Hawaiian S.S. Co., *supra,* 211 F.2d 16, n.4 cited to the text at p. 18: "It is difficult to conceive of a situation where there is no contract, either express or implied,

between an employer whose men are aboard or about a vessel and the owner or charterer of such vessel." I think it is impossible. Cf. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., *supra*, 350 U.S. at pp. 132-135.

Although the record does not reveal how Dugan and McNamara, Inc. came on board the vessel, some person must have engaged that company for stevedoring. Even if we were to assume that the consignee, or consignor, or some disinterested stranger, had hired Dugan and McNamara, Inc. to unload the cargo, a relationship, contractual in nature, would have arisen whereby Dugan and McNamara, Inc. would have been obligated to indemnify Waterman for damages which Waterman had sustained by reason of Dugan and McNamara, Inc.'s failure to unload the vessel as its duty requires. Under the assumed circumstances Waterman could be deemed to be a third-party beneficiary of the contract made by the consignee or the consignor with Dugan and McNamara, Inc. for the unloading.

Or if it be the fact, as is asserted, that there was no express contract, written or oral, Dugan and McNamara, Inc.'s obligation to indemnify Waterman could be held to be one of *implied assumpsit*.[3] Certainly it should not be assumed that Dugan and McNamara, Inc. came upon the vessel by accident and accidentally unloaded it and there is evidence tending to prove that the longshoreman was [fol. 276] injured because Dugan and McNamara, Inc. failed in its duty.

Clearly there were issues here involved as to the respective liabilities of the parties, Waterman and Dugan and

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[3] At common law assumpsit was implied where an undertaking was presumed to have been made by a party from his conduct although he had made no express promise. If there was a breach of contract in the performance the performer was held liable, *ex contractu*. Moses v. Macferlan, 97 Eng. Rep. 678 (1760). See also *Corpus Juris Secundum* Vol. 42, *Indemnity*, Section 21, pp. 596-597 and the dissenting opinion of Judge Goodrich in P. Dougherty Co. v. United States, 207 F.2d 626, 651 (1953), citing Dean Ames, writing in 2 Harv. L. Rev. 1 on "The History of Assumpsit", set out on page 2. See also Revel v. American Export Lines, referred to in note 2, *supra*, 162 F. Supp. at pp. 286-287.

McNamara, Inc., which should have gone to the jury with proper instructions. See again Weyerhaeuser S.S. Co. v. Nacirema Co., *supra*, 355 U.S. at p. 568.

For the reasons stated I respectfully dissent.

[fol. 277] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING,

vs.

WATERMAN STEAMSHIP CORPORATION, Appellant,

vs.

DUGAN & MCNAMARA, INC.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

Present: Biggs, Chief Judge, and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

JUDGMENT—January 16, 1959

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

January 16, 1959

[fol. 278] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,537

[Title omitted]

MOTION TO STAY RETURN OF MANDATE AND GRANT REHEARING NUNC PRO TUNC—Filed February 27, 1959

To the Honorable, the Judges of the Said Court:

Waterman Steamship Corporation, Appellant, by its attorneys, by reason of the decision of the Supreme Court of the United States in *Crumady* v. *Joachim Hendrik Fisser* v. *Nacirema Operating Co., Inc.*, announced on February 24, 1959, (27 United States Law Week 4158), respectfully moves this Honorable Court for leave to file a petition for rehearing in the above-captioned appeal nunc pro tunc, and to extend the stay of mandate from March 2, 1959 to April 1, 1959, or grant such other and further relief as may be deemed just in the premises.

Rawle & Henderson, By Harrison G. Kildare, Attorneys for Appellant.

[fol. 279] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Title omitted]

Present: Biggs, Chief Judge, and Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

ORDER GRANTING LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME AND STAYING ISSUANCE OF MANDATE—Filed March 10, 1959

Upon consideration of the motion filed by appellant on February 27, 1959 in the above-entitled case,

It is Ordered that leave be, and it hereby is granted appellant to file a petition for rehearing out of time on or before March 26, 1959;

It is further Ordered that the issuance of the mandate of this Court be stayed until further order of this Court.

By the Court,

William H. Hastie, Circuit Judge.

March 10, 1959

[fol. 280] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

PETITION FOR REHEARING—Filed March 17, 1959

Waterman Steamship Corporation, appellant herein, petitions for a rehearing and shows to this Honorable Court as follows:

I.

On January 16, 1959 this Court affirmed the judgment of the court below that appellant, a shipowner, was barred as a matter of law from claiming indemnity against Dugan & McNamara, Inc., a stevedoring company, for the reasonable sum paid to Jasper King, a longshoreman employed by the stevedoring company, in settlement of King's claim against petitioner for damages arising from personal injury while engaged in discharging bagged sugar from petitioner's vessel in the port of Philadelphia.

The decision of this Court was based upon the absence of contractual privity between petitioner, as shipowner, and the stevedoring company, whose services had been engaged by and on behalf of the charterer of the vessel. The opinion stated in part as follows:

> "The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim. Any obligation of a stevedoring company to indemnify a ship for shipboard injury of its employees in the course of their employment must be bottomed on agreement between

the parties, express or implied in fact. We have so stated in Brown v. American Hawaiian S. S. Co., 3d Cir. 1954, 211 F. 2d 16, 18 and Crawford v. Pope & Talbot, Inc., 3d Cir. 1953, 206 F. 2d 784, 793. We adhere to that view of the matter."

The dissenting opinion of Chief Judge Biggs noted that "the jury would have been entitled to find, as contended by Waterman, that the 'direct, proximate, active and substantial cause of the accident' was the negligence of the [fol. 281] stevedoring company." Consequently, the only issue on which the judgment was affirmed was the absence of any contractual arrangement between the shipowner and the stevedoring company, either *express or implied in fact.*

Petitioner's contention that the stevedoring company was under a contractual obligation *implied by law* from the relationship of the parties was rejected. This conflicts with decisions of the courts of appeals in the Ninth Circuit (*States S. S. Co.* v. *Rothschild International Stevedoring Co.*, 205 F. 2d 253, and *American President Lines* v. *Marine Terminal Corp.*, 234 F. 2d 753); in the Second Circuit (*Rich* v. *U. S.*, 177 F. 2d 688, and see *Allen* v. *States Marine Corporation of Delaware*, 132 F. Supp. 146, S. D. N. Y.); in the Fourth Circuit (*Cornec* v. *Baltimore & Ohio R. Co.*, 48 F. 2d 497); in the Tenth Circuit (*Thomas* v. *Malco Refineries, Inc.*, 214 F. 2d 884); and in the District Court of Massachusetts (*Considine* v. *Black Diamond S. S. Corp. et al.*, 163 F. Supp. 109).

It also fails to give full effect to the decisions of the Supreme Court of the United States in *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic Steamship Corp.*, 350 U. S. 124 (1956), and in *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563 (1958).

II.

The ruling in the present case directly conflicts with the decision of the Supreme Court of the United States in *Crumady* v. *Joachim Hendrik Fisser* v. *Nacirema Operating Co., Inc.*, 27 U. S. Law Week 4158 (decided February 24, 1959), in which the Court, reversing the Third Circuit,

granted indemnity *in the absence of contractual privity.* The opinion states (at 27 L. W. 4159):

> "The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recog- [fol. 282] nizes rights in third-party beneficiaries. Restatement, Law of Contracts, Sec. 133. Moreover, as we said in the Ryan case, 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U. S. at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' Id., at 133-134. See MacPherson v. Buick Motor Co., 217 N. Y. 382.
>
> "We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over."

This statement of the law applies with equal force to the present case, where there was sufficient evidence for submission to the jury the question of the stevedoring company's negligence "bringing into play" the unseaworthy condition of the bags at the time of their removal. Under the circumstances, the petitioner is entitled to a new trial.

Respectfully submitted,

Rawle & Henderson, 1910 Packard Building, Philadelphia 2, Pa., Attorneys for Petitioner.

Of Counsel: Harrison G. Kildare, Thomas F. Mount.

Certificate of Counsel

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to favorable consideration of the Court; and that it is not filed for the purpose of delay.

Thomas F. Mount, Of Counsel to Petitioner.

[fol. 283] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

[Title omitted]

Present: Biggs, Chief Judge; and Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie, Circuit Judges.

ORDER VACATING JUDGMENT, WITHDRAWING PER CURIAM AND DISSENTING OPINION AND DIRECTING FILING OF SUPPLEMENTAL BRIEFS—April 7, 1959

Upon consideration of the petition for rehearing and of the answer thereto, in the above entitled case,

It is Ordered that the judgment of this Court entered January 16, 1959 be and it is hereby vacated and that the Per Curiam and dissenting opinion filed January 16, 1959 be and they are hereby withdrawn;

It is Further Ordered that the parties may file supplemental briefs as to the effect of the decision by the Supreme Court of the United States in *Crumady, Petitioner* v. *"Joachim Hendrik Fisser", etc. Petitioner* v. *Nacirema Operating Co., Inc.*, No. 62, October Term 1958, on the issues in the above entitled case;

It is Further Ordered that decision is reserved as to whether and when oral argument is to be had.

By the Court:

William H. Hastie, Circuit Judge.

Dated: April 7, 1959

[fol. 284]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,537

JASPER KING,

v.

WATERMAN STEAMSHIP CORPORATION, Defendant and Third-Party Plaintiff, Appellant,

v.

DUGAN & McNAMARA, INC., Third-Party Defendant, Appellee.

Appeal From the United States District Court for the Eastern District of Pennsylvania

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Argued June 10, 1958

Reargued December 1, 1958

Reargued October 5, 1959

Before: Biggs, Chief Judge; Goodrich, McLaughlin, Kalodner, Staley, Hastie and Forman, Circuit Judges.

OPINION OF THE COURT—Filed November 17, 1959

By HASTIE, *Circuit Judge.*

This is an appeal by a third-party plaintiff from a decision that as a matter of law it is not entitled to be in- [fol. 285] demnified by the appellee, against which it has made the present third-party claim. The appeal, originally argued before a division of this court, has been reargued twice before the court en banc. We ordered the second re-

argument so that the parties might fully present their views concerning the force and effect of the decision of the Supreme Court in *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, decided February 24, 1959, after the first reargument. This second reargument has also permitted Judge Forman, who has joined us since the first reargument, to participate in the decision of a doubtful question of importance which has divided us.

In the court below appellant shipowner, Waterman Steamship Co., was both defendant to the original maritime tort claim of a stevedore for shipboard injury and third-party plaintiff claiming indemnity from appellee, Dugan & McNamara, Inc., the stevedore's employer. The shipowner now appeals from a decision that it is not entitled to indemnity from the stevedoring company for an amount it has paid in satisfaction of the stevedore's principal claim. In the present posture of the litigation it must be and is admitted that the stevedore's injuries were caused in part by improper stowage of cargo. Appellant concedes its absolute liability to the injured stevedore for the hurtful consequences of this unseaworthy condition. However, appellant claims indemnity from the stevedoring company on the theory that primary responsibility for the accident and an obligation to indemnify the shipowner should be imposed on the appellee because the immediate cause of the accident was appellee's negligence in unloading the cargo, improper though the stowage admittedly was.

How this case might have stood had the stevedoring company been employed by the owner or operator of the ship to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third party complaint nor sought to prove any contractual relation or undertaking as the basis of the alleged liability. Rather, [fol. 286] as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctness of this allegation was stipulated at trial. Whatever arrangement was made for unloading the cargo,[1]

[1] It was stated to us in argument and mentioned by the court below in directing a verdict against the third-party claim that the stevedoring company had been employed by the owner of the

the shipowner was not party to it and on the present record claims no standing under it.

The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim. We have said as much in *Brown* v. *American-Hawaiian S.S. Co.*, 3d Cir., 1954, 211 F.2d 16, 18 and *Crawford* v. *Pope & Talbot, Inc.*, 3d Cir., 1953, 206 F.2d 784, 792. Any obligation of a stevedoring company to indemnify a shipowner for shipboard injury of its employees in the course of their employment must be bottomed on a promise, express or implied in fact, of the stevedoring company. Otherwise, tort liability would be imposed upon the stevedoring company for negligent injury of its employee, a result prohibited by the Longshoremen's and Harbor Workers' Act. However, it is strongly urged that the Supreme Court in *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, has rejected the reasoning and impaired the authority of the *Brown* and *Crawford* cases. That contention is our principal concern here.

In the *Crumady* case the Supreme Court reviewed a decision of this court. We had not adjudicated the question of indemnity because it had been our view that there was no liability on the principal claim. However, the Supreme Court reversed us on the principal claim and then considered and sustained the indemnity claim. Thus, in considering what the Supreme Court said and did in the *Crumady* case we deal with an entirely familiar record.

Crumady was a libel in rem against a vessel by a stevedore who had been injured in unloading cargo. The ship [fol. 287] impleaded the stevedoring company which had undertaken the unloading operation and had employed the principal plaintiff. The evidence showed that the shipowner had chartered the vessel to an operator who had contracted with the stevedoring company to unload the vessel. In these circumstances the Supreme Court ruled that "[t]he warranty [of workmanlike service] which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are

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cargo to unload it. But no evidence was introduced concerning this matter and counsel for the appellant stated to the court below that the particular contractual arrangement under which the unloading was performed was not material to the third-party claim.

parties to the contract or not." 358 U.S. at 428. The court added that the circumstances under consideration suffice "to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries". *Ibid.* Thus, the actual holding of the *Crumady* case seems to be that a contractual undertaking of the stevedore with the operator of a ship, who is not the owner, to unload in a safe and workmanlike manner inures to the ship. In contrast the case now before us affords no basis for finding or assuming that the operator of the ship had any dealing whatever with the stevedoring company which discharged the cargo. To the contrary, as already pointed out, the District Court indicated and counsel have represented that the carriage was on such terms and conditions that the consignee was responsible for the discharge of its own goods and arranged with the stevedoring company for the performance of that job. The shipowner and the stevedoring company were strangers. It necessarily follows that the alleged duty upon which the present claim rests can only be an imposition on a wrongdoer *in invitum*. It is a question of tort liability, rather than one of contract or warranty, whether either wrongdoer must share the burden of a recovery by the injured party against the other wrongdoer. In reality we have here a problem of contribution between tortfeasors and not one of indemnification for breach of warranty. And the Supreme Court has clearly ruled that in these stevedore injury cases the shipowner may not require contribution [fol. 288] from the stevedoring company. *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 1952, 342 U.S. 282.

We find no indication that the Supreme Court in the *Crumady* case intended to abrogate or disregard the distinction between a permitted recovery-over based on contract and a prohibited misuse of the concept of indemnity to obtain contribution from a tortfeasor who enjoys the protection of the Longshoremen's and Harbor Workers' Act. We cannot square a recovery in this case with adherence to that distinction.

The judgment will be affirmed.

BIGGS, *Chief Judge*, dissenting.

The record shows that the accident to King, the longshoreman whose claim against Waterman Steamship Corporation, the third-party plaintiff-appellant, was reasonably compromised by it, was caused by two factors. The accident occurred, first, because of the improper stowage of the cargo, bags of sugar, and second, because of the negligence of Dugan & McNamara Company, Inc., the third-party defendant, in unloading the cargo. It was stipulated that there was "no agreement, written or oral, between the ship and Dugan & McNamara". The decision of this court is based upon the absence of contractual privity between Waterman and Dugan & McNamara though it appears to be conceded that if there were a contractual relation between them indemnity might be had by Waterman. See Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corp., 350 U.S. 124 (1956), and Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc., 355 U.S. 563 (1958).

In the decision of the Supreme Court in Crumady v. The J. H. Fisser, 358 U.S. 423, 428-429 (1959), Mr. Justice Douglas stated: "We think this case is governed by the principle announced in the *Ryan* case. The warranty which a stevedore owes when he goes aboard a vessel to perform [fol. 289] services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, §133. Moreover, as we said in the *Ryan* case [cited *supra*], 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U.S. at 133. They are part of the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product.' *Id.*, at 133-134. See *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050.

"We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover over."

I can perceive no merit to the distinction attempted to be made by the majority that the proceeding in Crumady was *in rem* against the vessel and that the evidence showed that the shipowner had chartered the vessel to an operator who had contracted with the stevedoring company to unload it. Crumady shows that Waterman by way of the third-party beneficiary contract, was entitled to the warranty of workmanlike service that Dugan & McNamara, Inc. gave when it undertook to unload the vessel.

The judgment of the court below should be reversed.

Judge Goodrich and Judge McLaughlin join in this dissent:

GOODRICH, *Circuit Judge*, Concurring in dissent.

I agree with what Chief Judge Biggs has said in his dissent. I only want to add one idea. It seems to me that with the elimination of the necessity of contract between shipowner and stevedore, as I think the *Crumady* case decides, we may have developing here a situation in which [fol. 290] rights of shipowner against stevedore may be analyzed as growing out of a relationship between them not dependent upon contract. The stevedore comes on the ship to perform labor and he comes with the permission of the shipowner. It seems to me out of this permission and the relation established thereby there can well be a duty owed to the shipowner not to create, by the acts of the stevedore, a situation which will cause loss to the shipowner. An analogy is to be found in the duty of a person responsible for the conduct of another to be indemnified by the other for expense made in discharge of such a responsibility. See RESTATEMENT, RESTITUTION, §§ 96-99.

[fol. 291] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 12,537

JASPER KING,

vs.

WATERMAN STEAMSHIP CORPORATION, Appellant,

vs.

DUGAN & McNAMARA, INC.

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

Present: Biggs, Chief Judge; Goodrich, McLaughlin, Kalodner, Staley, Hastie and Forman, Circuit Judges.

JUDGMENT—November 17, 1959

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

November 17, 1959

[fol. 292] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT (omitted in printing).

[fol. 293]

SUPREME COURT OF THE UNITED STATES

No. 697, October Term, 1959

WATERMAN STEAMSHIP CORPORATION, Petitioner,

vs.

DUGAN & McNAMARA, INC.

ORDER ALLOWING CERTIORARI—March 28, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.